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Supreme Court of the United States

October Term, 1992

U.E. ENTERPRISES, INC.; FLUSHING STAR, INC.; CHAN'S VIDEO & TRADING, INC.; GONG PICTURES, INC.; DANG'S VIDEO, INC.; PO YUEN,

Petitioners,

v.

NEW YORK CHINESE TV PROGRAMS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Pursuant to Rule 15.1 of this Court, Respondent submits that Petitioners' statement of the question presented is erroneous. Respondent respectfully submits that the question presented is as follows:

> Whether works authored by Taiwanese citizens continue to be entitled to copyright protection under 17 U.S.C. § 104(b)(1) of the United States Copyright Laws after the Executive's termination of formal governmental relations with the Republic of China in 1979.

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STATEMENT OF THE CASE

As is demonstrated below, there is no basis whatsoever for granting Petitioners' writ and Petitioners are merely grasping at straws in a last ditch effort to avoid liability for their copyright piracy. At the outset, Petitioners' writ is based on a fundamental misconception. The Petition challenges Taiwan's status as a nation under *international law*. However, the only issue presented here is one of *domestic law, i.e.*, whether there is copyright protection for works authored by Taiwanese authors under the United States Copyright Laws.

Facts

This action arises out of intentional infringement by the Petitioners' and others in 1987-88 of copyrighted television programs owned by Respondent New York Chinese TV Programs, Inc.[1] ("Respondent" or "NY Chinese"). These programs are Mandarin language television programs (the "Programs") produced by the three television stations in Taiwan. (Petits.' App. at A17).

International Audio Visual Communications Inc., a California corporation ("IAVC"), is the owner of and has the exclusive right to distribute the Programs in the United States and Canada. IAVC distributes the Programs in videocassette format to the Chinese-speaking communities in the United States and Canada. Pursuant to a license agreement and assignment, IAVC granted Respondent the exclusive right to distribute the Programs in New York and New Jersey (the "Territory") and assigned the copyrights in the Programs to Respondent in the Territory. (Petits.' App. at A16-17).

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1. Pursuant to Rule 29.1, Respondent New York Chinese TV Programs, Inc. advises the Court that it has no corporate parents, subsidiaries or affiliates.

Petitioners' Dang's Video and U.E. Enterprises, Inc., through their controlling persons, including Petitioner Po Yuen (collectively "U.E." or "Petitioners"), began to import and distribute counterfeit copies of the Programs in the Territory. The counterfeit copies were made by taping the Programs off the air when they were broadcast on television in Taiwan. Petitioners imported master tapes of the pirated programs in boxes marked "Gift", copied them, and then distributed them to numerous retail stores in the Territory. (Petits.' App. at A18).

Applicable Statutes And Executive Orders

The statute which governs Petitioners' challenge to Respondent's copyrights is Section 104(b)(1) of the Copyright Act of 1978, 17 U.S.C. § 104(b)(1)(1977), which sets forth certain of the bases for eligibility for United States copyright protection:

> (b) Published Works. -- The works specified by sections 102 and 103, when published, are subject to protection under this title if --
>
> (1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party, or is a stateless person, wherever that person may be domiciled[.]

The copyright treaty which affords protection for the Programs is the Treaty of Friendship, Commerce and Navigation,

Nov. 4, 1946, U.S.-Taiwan, 63 Stat. 1299 (1946) (the "FCN Treaty"). The FCN Treaty was ratified by the United States Senate in June 1948, and took effect on November 30, 1948. Article IX of the FCN Treaty provides for reciprocal protection for "copyrights, patents, trademarks, trade names, and other literary, artistic and industrial property, upon compliance with the applicable laws and regulations, if any, respecting registration and other formalities which are or may hereafter be enforced by the duly constituted authorities, ..." *Id.* at 1309.

In 1979, President Carter recognized the Peoples' Republic of China ("PRC") and terminated diplomatic relations with the Republic of China. However, the President issued "Relations With The People On Taiwan: Memorandum for All Departments and Agencies" (Dec. 30, 1978), *reprinted in* 1979 U.S.C.C.A.N. 75 (the "Presidential Memorandum"). The Presidential Memorandum provides, among other things, that the termination of diplomatic relations with the Republic of China will not affect the maintenance of "commercial, cultural, and other relations" between the people of the United States and "the people of Taiwan without official government representation or diplomatic relations". *Id.* Most pertinent here, the Presidential Memorandum directs that:

> Existing international agreements and arrangements in force between the United States and Taiwan shall continue in force and shall be performed and enforced by departments and agencies beginning January 1, 1979, in accordance with their terms and, as appropriate, through that instrumentality.

Id.

Congress, in turn, enacted the Taiwan Relations Act (the "TRA"), 22 U.S.C. §§ 3301-3316 (1990). While numerous of the provisions of the TRA are relevant to the issue presented here, several sub-sections of § 3303 of the Act should be specifically enumerated since they are dispositive of the Petition.

Section 3303(c) of the TRA provides in no uncertain terms for:

> [T]he continuation in force of all treaties and other international agreements . . . entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

Section 3303(b)(1) squarely rebuts the very argument advanced by Petitioners in their writ:

> (1) Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

Similarly, § 3303(a) mandates that:

> The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan . . . in the

> [same] manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.

Likewise, § 3303(b)(8) directs that:

> (8) No requirement, whether expressed or implied, under the laws of the United States with respect to maintenance of diplomatic relations or recognition shall be applicable with respect to Taiwan.

The District Court's Decision

The District Court found Petitioners' liable for willful copyright infringement and assessed damages of over $750,000, plus attorneys' fees. (Petits.' App. at A72-76). In finding Petitioners liable for copyright infringement, the District Court rejected their contention that there was no copyright protection for the Programs under 17 U.S.C. § 104(b)(1) as a result of President Carter's derecognition of the Republic of China and termination of formal diplomatic relations with it in 1979.

The District Court rejected all of the arguments Petitioners advanced in support of their position and found that the TRA "constitutionally continues in force those provisions of the FCN Treaty providing reciprocal copyright protection to Taiwanese nationals . . . ." (Petits.' App. at A37). The District Court found Petitioners' constitutional challenges to the FCN treaty to be without merit and that they, in any event, were not outcome determinative since Congress made it clear in the TRA that

domestic copyright protection under § 104(b)(1) -- the only issue raised by this case -- continued to exist for Taiwanese copyrights. (Petits.' App. at A36-37).

The Second Circuit's Decision

The United States Court of Appeals for the Second Circuit affirmed the District Court's ruling that copyright protection continues to exist for works authored by Taiwanese citizens under 17 U.S.C. § 104(b)(1) notwithstanding President Carter's derecognition of the Republic of China.[2] The Second Circuit found that the FCN Treaty, which took effect in November, 1948, grants United States "copyright protection to works authored by Taiwanese citizens." (Petits.' App. at A5).

The Second Circuit found of controlling importance that both of the political branches considered the FCN Treaty to remain in effect. Thus, the Second Circuit reasoned that:

> The difficulty with the defendants' argument lies in their root premise that the FCN Treaty lapsed upon derecognition of Taiwan. It is well settled that "on the question whether a treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling

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2 The United States submitted a Statement of Interest in the District Court and a brief as *amicus curiae* in the Court of Appeals. Among other things, the Government informed the court that it considered the FCN Treaty to be in full force and effect.

> importance." *Terlinden v. Ames*, 184 U.S. 270, 285 (1902). Moreover, the judiciary should refrain from determining whether a treaty has lapsed, and instead should defer to the wishes of the elected branches of government. *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888). In this case, both Congress and the Executive Branch have, with rare clarity, determined that the United States must continue to honor the FCN Treaty, despite official diplomatic derecognition of Taiwan.

(Petits.' App. at A9-10).

The Second Circuit emphasized that both of the political branches had taken painstaking care to leave no doubt that the FCN Treaty remained in effect:

> The TRA requires the United States to honor all previous treaties and international agreements with Taiwan. Among these obligations is the FCN Treaty, which was explicitly noted by the House of Representatives in its report on the TRA. H.R. Rep. No. 26, 96th Cong., 1st Sess. 10-11 (1979). Thus, we find that Congress indisputably intended that the FCN Treaty remain a valid and enforceable treaty.
>
> Similarly, the Executive Branch has not wavered from honoring the FCN Treaty. Each edition of the State Department pamphlet *Treaties*

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> *in Force* published between 1979 and the present date lists the FCN Treaty as a valid treaty. Moreover, we have not located any proclamation from either the President or any Executive Agency renouncing the United States' obligations under the FCN Treaty.

(Petits.' App. at A10).

While not necessary to its conclusion, the Second Circuit flatly rejected Petitioners' contention that it was unconstitutional for the United States to continue to honor the FCN Treaty. More specifically, the Second Circuit rejected Petitioners' argument that it followed from the Executive's derecognition of the Republic of China that Taiwan is no longer a nation capable of being party to a treaty and, consequently, that there was no constitutionally permissible way for the Government to keep the FCN Treaty in effect. (Petits.' App. at A10-12).

The Second Circuit concluded that there is no requirement that the United States recognize or maintain diplomatic relations with a foreign state in order to have a valid treaty with it. The Second Circuit further reasoned that Taiwan had the attributes of a "nation" in that it had "(1) a defined territory; (2) a permanent population; (3) a government and (4) the ability to engage in relations with other nations." (Petits.' App. at A11).

After rejecting the various arguments asserted by Petitioners, the Second Circuit held that:

> [T]he FCN treaty is still in effect by virtue of both Congress' enactment of the TRA and the

> Executive Branch's position that the FCN has remained in effect, and that the actions of both of these branches do not violate the Constitution. *The FCN is a valid "treaty" for purposes of Section 104(b)(1) of the Copyright Act.* Accordingly, the district court correctly held that the Programs enjoy copyright protection, and defendants are liable for copyright infringement.

(Petits.' App. at A13). (Emphasis added).

REASONS FOR DENYING THE WRIT

The Petition should be denied for a variety of independently dispositive reasons.

First, the Second Circuit's decision (the "Decision") is not in conflict with the ruling of any other United States court of appeals. Indeed, the Decision is not in conflict with the decision of any court. On the contrary, the Decision is consistent with the decisions of all courts that have addressed the issues raised by Petitioners. In short, none of the grounds set forth in Rule 10 for this Court to exercise its discretionary jurisdiction is present here.

Second, the linchpin of Petitioners' writ is their disingenuous assertion that the Decision "is a fundamental violation of the separation of powers because it strikes at the core of the Executive power over foreign affairs." (Petition at 2). The very opposite is true.

The basis of the Decision is that the political branches are entrusted with the conduct of our foreign affairs and that both the

Executive and Congress have directed in the clearest terms that the FCN Treaty remains in full force and effect notwithstanding President Carter's termination of formal governmental relations with the Republic of China in 1979. It is Petitioners who are seeking to interfere with the political branches' conduct of our foreign affairs by seeking to have the judiciary overrule the unequivocal directives of the Executive and Congress.

Third, the sole basis on which Petitioners seek review by this Court was not even raised by them before the District Court. Instead, Petitioners affirmatively took the position below that the Executive could enter into a binding treaty with a government that it did not recognize and, more specifically, could enter into a valid treaty with the "governing authorities on Taiwan".

Fourth, the only issue raised by Petitioners in their writ is not necessary to the decision below. While Petitioners challenge the Decision on international law grounds, the only issue which need be determined in the present case is whether there is copyright protection for the Programs under § 104(b)(1) of the United States Copyright Laws. Here, Congress has unequivocally provided that United States copyright protection continues to exist for works authored by Taiwanese citizens and that Taiwan shall be deemed a nation for purposes of domestic law, including the Copyright Laws.

ARGUMENT

I.

THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

The Decision does not conflict with the decision of any other United States court of appeals. Nor does it conflict with the decision of any other federal or state court.

On the contrary, the Second Circuit's decision is consistent with that of every court that has addressed the issue in any fashion. For instance, in *Chang v. Northwestern Memorial Hosp.*, 506 F. Supp. 975 (N.D. Ill. 1980), the court rejected an attack on the continuing validity of the FCN Treaty and the rights of Taiwanese nationals thereunder similar to that made by Petitioners here. In finding that the FCN Treaty remained in full force and effect after 1979 and that Taiwanese nationals have rights thereunder, the court noted that both the President and Congress had declared that existing international agreements with Taiwan remain in full force and effect.

More recently, in *Millen Indus. v. Coordination Council*, 855 F.2d 879 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia rejected the very argument raised by Petitioners before this Court. The Court of Appeals for the District of Columbia found that the act of state doctrine -- under which the courts will not review certain acts taken by another sovereign within its own territory -- applies to Taiwan. The court

further reasoned that "given the plainly expressed intent of Congress in the TRA . . . there can be no question that the act of state doctrine applies to Taiwan as fully as if Taiwan were recognized by this country." *Id.* at 882. Accordingly, the court in *Millen* found that Taiwan is a "nation" for purposes of domestic law, the only issue raised by the case at bar. *Accord Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 530 A.2d 1163 (D.C. 1987) (Taiwan is a "nation" for purposes of domestic law).

II.

THE SECOND CIRCUIT'S RULING THAT THAT THE FCN TREATY REMAINS IN FULL FORCE AND EFFECT IS ENTIRELY CORRECT

While Petitioners blithely assert that the Second Circuit invaded the prerogative of the Executive in conducting foreign affairs, it is Petitioners who are seeking to interfere with the political branches' conduct of our foreign affairs.

A. The Executive Branch Has Determined That The FCN Treaty Remains In Force And Effect

As Petitioners admitted before both the District Court and the Second Circuit, a valid copyright treaty, *i.e.*, the FCN Treaty, was in effect between the United States and the Republic of China at least until 1979. However, Petitioners claimed below that the FCN Treaty ceased to be of any force or effect when President

Carter terminated governmental relations with the Republic of China in 1979.

However, when President Carter recognized the PRC and terminated formal governmental relations with the Republic of China in 1979, he made it clear that such decision would not affect commercial, cultural, and other relations with Taiwan. Among other things, the Presidential Memorandum, *supra* directs that:

> Existing international agreements and arrangements in force between the United States and Taiwan shall continue in force and shall be performed and enforced by departments and their agencies beginning January 1, 1979, in accordance with their terms and, as appropriate, through their instrumentality.

1979 U.S.C.C.A.N. at 75.

Moreover, the FCN Treaty has been listed each year since 1979 in *U.S. Dep't of State, Pub. No. 9433, Treaties in Force* (1992) ("*Treaties in Force*") -- the State Department's official listing of treaties in force as to which the United States is a party -- as a copyright treaty which remains in full force and effect. (Petits.' App. at A7).

The federal courts have consistently deferred to the Executive's determination of the status of treaties as reflected in this publication and otherwise. *See, e.g., Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 682 (9th Cir. 1983); *Hoi-Pong v. Noriega*, 677 F. Supp. 1153, 1155 (S.D. Fla. 1988) ("The United States considers the treaty binding and has demonstrated that fact

by recording the treaty in its official publication, *Treaties in Force* . . . .").[3]

As the Second Circuit stated in the Decision, the determination whether a treaty remains in effect and with whom is within the province of the Executive Branch. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), *cert. denied*, 390 U.S. 956, *reh'g denied*, 390 U.S. 1037 (1968); *United States v. Pink*, 315 U.S. 203, 229 (1942); *Americans United For Separation of Church and State v. Reagan*, 786 F.2d 194, 201 (3d Cir.), *cert. denied sub. nom American Baptist Churches in U.S.A. v. Reagan*, 479 U.S. 914, *reh'g denied*, 479 U.S. 1012 (1986) (Executive's decision to extend diplomatic relations to the Vatican was a "judicially unreviewable political decision"). Accordingly, the Executive Branch's determination that the FCN Treaty remains in full force and effect with Taiwan and its citizens, as applied to the issues involved in this action, should be given controlling effect. *See Terlinden v. Ames*, 184 U.S. 270, 285 (1902).

In fact, the crux of the Petition is that such questions are to be determined by the Executive; all of the cases relied on by Petitioners stand for this very proposition. *See, e.g.*, Petition at 11 n. 4, citing *Jones v. United States*, 137 U.S. 202, 212 (1890) (holding that "'[w]ho is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any

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3 As discussed above, the United States appeared in this action by written submission before both the District Court and the Second Circuit to, *inter alia*, inform the Court that the Executive considers the FCN Treaty to remain in full force and effect.

government conclusively binds the judges'"). Yet this is precisely what the Second Circuit did, *i.e.*, defer to the Executive's plain and unambiguous directive that treaties such as the FCN Treaty remain in full force and effect.

B. Congress Has Enacted Legislation Which Expressly Provides That The FCN Treaty Remains In Effect

President Carter also requested in the Presidential Memorandum, *supra* that Congress enact legislation to insure that his recognition of the PRC and termination of formal governmental relations with the Republic of China would not otherwise affect relations between the United States and Taiwan and its people. 1979 U.S.C.C.A.N. at 76. In response, Congress passed the TRA.

The TRA expressly provides that all treaties and other international agreements with the Republic of China remain in full force and effect. Thus, § 3303(c) of the TRA mandates:

> For all purposes, including actions in any court in the United states, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

Senate Rep. No. 7, 96th Cong., 1st Sess. 1 (1979), *reprinted in* 1979 U.S.C.C.A.N. 36, 60 (the "Senate Report") on § 3303(c) explains:

> This section [104] was added by the Committee to remove any doubt concerning the validity of the international agreements in force between the United States and the entity recognized as the Republic of China prior to the normalization of relations with the People's Republic of China. Its effect is to make clear that these agreements have not "lapsed" and that they continue in effect between the United States and the people on Taiwan. The reference to all courts "in" the United States expresses the Committee's intent that this rule of substantive Federal law be applied by both Federal and State courts.

Indeed, the FCN Treaty is specifically enumerated in the legislative history to § 3303(c) as one of the treaties which remain in full force and effect in favor of Taiwan and its people. Thus, H.R. Conf. Rep. No. 71, 96th Cong., 1st Sess. 11 (1979), *reprinted in* 1979 U.S.C.C.A.N. 95, 99 (the "House Conference Report") on § 3303(c) provides:

> With regard to the issue of conditioning the right to sue and be sued on reciprocity, the Committee of Conference noted that Article VI(4) *of the Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of China (TIAS 1871, 63 Stat. 1289)*

> guarantees freedom of access to the courts in each county by the nationals, corporations and associations of the other party, *and that this Treaty continues in force*.

(Emphasis added).

Similarly, H.R. Rep. No. 26, 96th Cong., 1st Sess. 10-11 (1979) (the "House Report"), *excerpted in Legislative History of the Taiwan Relations Act* at 202-03 (Lester L. Wolff & David L. Simon, eds. 1982) ("*Legislative History*") states that § 3303 is:

> [D]esigned to make clear that *all treaties and international agreements* between the United States and the Republic of China *which were in force before derecognition will continue to be in force*. For example, the U.S.-ROC Treaty of Friendship, Commerce and Navigation, which provides a legal foundation for commercial relations between the United States and Taiwan, *will continue without interruption*. No United States-Republic of China treaty or international agreement would be terminated except that which is terminated under its terms or otherwise, pursuant to U.S. law.

(Emphasis added).

In short, the Second Circuit was unquestionably correct in ruling that "[b]ecause both Congress and the Executive Branch agree that the FCN Treaty is to continue in effect, and because of the deference we owe to the political branches of the government in treaty matters, we hold that the FCN treaty remains a valid and enforceable treaty." (Petits.' App. at A10).

III.

PETITIONERS' ASSERTED GROUND FOR GRANT OF THEIR WRIT IS MERE APPELLATE AFTERTHOUGHT

A. Petitioners' Position Directly Conflicts With Their Position Below

Petitioners' sole ground for requesting review by this Court is their assertion that Taiwan is not a "nation", and, consequently, an enforceable treaty cannot exist between it and the United States. That this contention is merely a desperate attempt by Petitioners to avoid liability for their massive copyright piracy is graphically illustrated by their failure to even raise it before the District Court. On the contrary, Petitioners themselves took the position before the District Court that the United States could enter into a valid copyright treaty with Taiwan. Thus, Petitioners stoutly opined below, in contrast to the position taken by them in their Petition, that:

> Nothing in this argument requires a conclusion that Taiwanese works are irretrievably beyond the pale of United States copyright protection. On the contrary, plaintiff's copyright protection could have been -- and could yet be -- constitutionally preserved by at least three different means that Congress and the President have chosen not to pursue.

> First, the President could presumably negotiate a treaty or other protocol between the United States and "the governing authorities on Taiwan," similar to the arrangements made with the PRC prior to its recognition by the United States in 1979.

(Defendants' Memorandum of Law Establishing That the Federal Copyright Act Cannot Constitutionally Be Interpreted to Protect the Intellectual Property at Issue in This Case at 28-29 (footnote omitted), excerpted in Resp.'s App. at A1).

B. Petitioners' Contention Is Unsupportable And, In Any Event, Not Subject To Judicial Review

Petitioners are simply incorrect that a treaty cannot exist between the United States and an "entity" other than a foreign state which the United States formally recognizes. Not surprisingly, they fail to provide any support for their assertion, since scholarly commentaries, international conventions, government practice, and the case law all belie their position.

As one commentator has stated, "[u]nder the Vienna Convention on the Law of Treaties, 'international agreements' may exist between states and 'other subjects of international law that are not states['], or between such 'other subjects of international law' themselves." R. Sean Randolph, *The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs*, 15 Int'l Law. 249, 260 (Spring 1981).

In fact, the United States has entered into a wide range of treaties with entities other than nations which the United States formally recognizes. For instance, as a review of *Treaties in Force* reveals, the United States has entered into treaties with a variety of international institutions such as the Caribbean Community Secretariat, the Food and Agricultural Organization, the International Telecommunications' Satellite Organization, the International Sugar Organization, and the World Tourism Organization.

Moreover, as discussed above, such determinations are for the Executive Branch to make; they are not subject to judicial review. Thus, in *Americans United for Separation of Church & State v. Reagan*, 786 F.2d 194 (3d Cir.), *cert. denied sub. nom American Baptist Churches in U.S.A. v. Reagan*, 479 U.S. 914, *reh'g denied*, 479 U.S. 1012 (1986), the Third Circuit rejected a claim substantially similar to that asserted by Petitioners here.

In that case, the plaintiffs claimed that President Reagan was barred by Article II of the Constitution from recognizing the Vatican because, according to plaintiffs, the Vatican is not a state upon which the President may confer diplomatic recognition. The Third Circuit framed the issue on appeal as follows:

> (1) Is the Vatican a territorial sovereignty sufficiently independent of other such sovereign entities as to be entitled to recognition?, and (2) Is the regime claiming to be its government entitled to recognition as such?

786 F.2d at 201. The Third Circuit ruled that the district court

properly dismissed plaintiffs' claim, reasoning that even if plaintiffs had standing to assert such claim "[i]t has long been settled that the President's resolution of such question constitutes a judicially unreviewable political decision." *Id.*

C. Petitioners' Contention Is Irrelevant To The Domestic Law Question Involved In This Case

Even assuming, *arguendo*, that Petitioners' contention had any merit as applied to international law -- which it plainly does not -- it would not affect the result reached below. The only issue presented in this case is one of domestic law, *i.e.*, whether a copyright treaty within the meaning of § 104(b)(1) of the United States Copyright Laws was in existence between the United States and Taiwan at the time of Petitioners' infringing activities.

When enacting the TRA, Congress expressly recognized the distinction between Taiwan's status under international law and under domestic law. As the Senate Report, *supra*, explains:

> The Administration has stated that it recognized the People's Republic of China (PRC) as the sole legal government of China. It has also acknowledged the Chinese position that Taiwan is a part of China, but the United States has *not* itself agreed to this position.[4] The bill submitted by the

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4 Petitioners assert that President Carter in the Joint Communique accepted the PRC's position that "there is one China and Taiwan

> Administration takes no position on the status of Taiwan under international law, but does regard Taiwan as a country for purposes of U.S. *domestic* law. The bill assumes that any benefits to be conferred on Taiwan by statute may be conferred without regard to Taiwan's international legal identity. The legal scholars consulted by the Committee agreed with this view. Most of these scholars thought it would be unwise to try to define Taiwan's international legal status. They said that the best approach would be to spell out the specific manner in which relations with Taiwan will be maintained by the United States. The proposed changes and amendments to S. 245 basically follow this approach.

1979 U.S.C.C.A.N. at 42. (Emphasis in original).

In the TRA, Congress was scrupulously careful in providing that the President's termination of diplomatic relations and withdrawal of recognition of the Republic of China was irrelevant under domestic law. For instance, the House Report states that:

> This section [201] deals with U.S. domestic law as it affects or relates to Taiwan. It is designed to continue the application of all U.S.

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is part of China." (Petition at 6). As the Joint Communique and the above-cited language reflects, this is simply not true. Rather, the President "acknowledged the Chinese position", not that the United States agreed with such position.

> laws, both Federal and State, with respect to Taiwan, as if derecognition had not occurred. In other words, derecognition is to be legally irrelevant in deciding issues involving Taiwan under U.S. law. In particular, this section preserves the rights and obligations of Taiwan under U.S. law.

House Report, *supra* 8-10, *excerpted in Legislative History* at 187-88.

Indeed, Congress in the TRA squarely and expressly addressed for purposes of domestic law the very argument raised by Petitioner in their writ. Thus, § 3303(b)(1) of the TRA provides:

> Whenever the laws of the United States refer or relate to foreign counties, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

For purposes of § 104(b)(1) of the Copyright Law, Congress's determination is conclusive. Thus, it is not necessary to reach the international law issue advanced by Petitioners since it is the prerogative of Congress to determine the meaning of domestic statutes. It has done so here in the clearest terms imaginable.

In *Millen Indus. v. Coordination Council*, 855 F.2d (D.C. Cir. 1988), the Court of Appeals for the District of Columbia

relied on § 3303(b)(1) of the TRA in finding that the act of state doctrine, a common law doctrine, applied to Taiwan notwithstanding the lack of diplomatic relations or recognition of that government. The *Millen* court concluded that "given the plainly expressed intent of Congress in the TRA . . . there can be no question that the act of state doctrine applies to Taiwan as fully as if Taiwan were recognized by this country." *Id.* at 882. Accordingly, the *Millen* court ruled that Taiwan must be treated as a nation for purposes of domestic law. *Accord, Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 530 A.2d 1163, 1170 (D.C. 1987) (in finding that Taiwan is to be treated as a nation under domestic law, the court noted that the provisions of the TRA are "plain and unambiguous" and not susceptible to "any other possible interpretation").

In short, the TRA in general and § 3303(b)(1) in particular are dispositive of Petitioners' writ.[5]

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5 Petitioners' attempt to transmute the § 104(b) issues presented by this case into a constitutional question suffers from yet another flaw. There is nothing in the Constitution which requires that a "copyright treaty" exist in order to afford domestic copyright protection to works created by foreign authors. Rather, this is merely one of several *statutory* grounds for United States copyright protection which are enumerated in § 104. In *Weinberger v. Rossi*, 456 U.S. 25 (1982), this Court reasoned that the courts should not construe the word "treaty" in a statute to require an Article II treaty absent some clear and affirmative expression of congressional intent to this effect. No such intent has been expressed by Congress as to § 104(b)(1).

D. While Such Issue Need Not Be Reached, Petitioners Are Also Wrong Under International Law

As shown above, the international law issue raised by Petitioners is irrelevant to the disposition of the copyright law issue presented in this case. Nevertheless, it should be pointed out that Petitioners are also wrong under international law. The Second Circuit was undoubtedly correct that Taiwan satisfies the international law definition of a "nation" in that it has "(1) a defined territory; (2) a permanent population; (3) a government; and (4) the ability to engage in relations with other nations." (Petits.' App. at A11).

As one international law scholar has opined on this very question, the "legal concept of state responsibility is equally applicable to both Chinas because they both meet the legal requirements of statehood under international law". Ahmed Sheikh, *The United States And Taiwan After Derecognition: Consequences And Legal Remedies*, 37 Wash. & Lee L. Rev. 323, 327 (Spring 1980). Another commentator has similarly concluded that:

> Taiwan, though denied legal recognition by the United States, nevertheless remains a de facto state and a juridically cognizable international entity. As such it has the capacity to conclude legally binding international agreements under international law.

R. Sean Randolph, *supra* at 261.

IV.

PETITIONERS LACK STANDING TO ASSERT THAT THE FCN TREATY IS NOT EFFECTIVE

Finally, Petitioners do not even have standing to maintain their challenge to the FCN Treaty. Where, as here, the parties to a treaty consider it to remain in effect, a private litigant lacks standing to claim that the treaty is no longer in effect. Thus, in *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 253, *reh'g denied*, 467 U.S. 1231 (1984), this Court reasoned that "when the parties to a treaty continue to assert its [continuing] vitality, a private person who finds the continued existence of the treaty inconvenient" can not claim that the "treaty ceases to be binding [because] there has been a substantial change in conditions since its promulgation." *Id.* at 244.

Both the United States and Taiwan consider the FCN Treaty, including its copyright provisions, to be effective. Among other things, works by Taiwanese authors continue to be eligible for copyright protection in the United States, and works by American authors continue to be eligible for copyright protection in Taiwan. (Petits.' App. at A13). Accordingly, Petitioners lack standing to maintain an attack on the continuing validity of the FCN Treaty in order to avoid liability for copyright infringement.

CONCLUSION

For all of the above reasons, U.E.'s Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 6, 1992

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEW YORK CHINESE TV PROGRAMS INC.,

Plaintiff,

- against -

U.E. ENTERPRISES, INC., FLUSHING STAR, INC., CHAN'S VIDEO & TRADING, INC., GONG PICTURES, INC., QUEENS VIDEO LTD., AND JOHN DOES NOS.1-50,

Defendants.

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Civil Action No.
88 Civ. 4170 (JMW)

MEMORANDUM OF LAW ESTABLISHING THAT THE FEDERAL COPYRIGHT ACT CANNOT CONSTITUTIONALLY BE INTERPRETED TO PROTECT THE INTELLECTUAL PROPERTY AT ISSUE IN THIS CASE

LAURENCE H. TRIBE
Of Counsel to Defendant
U.E. Enterprises, Inc.
Griswold Hall 307
1525 Massachusetts Avenue
Cambridge, MA 02138

III. HOLDING THAT PLAINTIFF'S PROGRAMS ARE NOT CURRENTLY PROTECTED BY § 104(b)(1) WOULD NOT UNDERMINE THE ABILITY OF THE PRESIDENT AND CONGRESS TO PROTECT TAIWANESE COPYRIGHTS

Nothing in this argument requires a conclusion that Taiwanese works are irretrievably beyond the pale of United States copyright protection. On the contrary, plaintiff's copyright protection could have been -- and could yet be -- constitutionally preserved by at least three different means that Congress and the President have chosen not to pursue.

First, the President could presumably negotiate a treaty or other protocol between the United States and "the governing authorities on Taiwan," similar to the arrangements made with the PRC prior to its recognition by the United States in 1979.[24]

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24 The United States made some side agreements with the PRC to govern relations with the mainland, especially after the beginning of normalization in 1972. See Gable, supra note 18, at 520. Cf. Randolph, The Status of Agreements Between the American Institute in Taiwan and the Coordination Council for North American Affairs, 15 Int'l Law. 249, 252 (1981) ("[u]nder the Vienna Convention on the Law of Treaties, legally unrecognized 'international agreements' may exist between states and 'other subjects of international law that are not states['], or between such 'other subjects of international law' themselves.")